

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NATHANIEL HEARN,)
Petitioner,)
v.) CIV 08-00252 PHX MHM (MEA)
DORA SCHIRO and) REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,)
Respondents.)

TO THE HONORABLE MARY H. MURGUIA:

On February 7, 2008, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Respondents filed an Answer to Petition for Writ of Habeas Corpus Limited to Affirmative Defenses ("Answer") (Docket No. 7) on April 15, 2008. Respondents contend the Court lacks subject matter jurisdiction over the petition because Petitioner was no longer in custody for the conviction or sentence under attack at the time he initiated his habeas action. Respondents also assert the action for habeas relief was not timely filed and, therefore, that the petition must be denied and dismissed with prejudice. On June 26, 2008, Petitioner filed a response to the answer to his habeas petition. See Docket No. 11.

1 **I Procedural History**

2 In the habeas petition filed February 7, 2008,
3 Petitioner challenges his 1982 conviction and sentence on one
4 count of sexual assault.

5 On January 13, 1982, in Maricopa County Superior Court
6 docket number CR1981-121923, Petitioner pled guilty to one count
7 of sexual assault, a class 2 felony. See Answer, Exh. B & Exh.
8 C. The guilty plea was pursuant to a written plea agreement
9 which provided for dismissal of the remaining two counts against
10 Petitioner, i.e., one count of sexual assault and one count of
11 possession of marijuana for sale. See id., Exh. B. A judgment
12 of conviction against Petitioner on one count of sexual assault
13 was entered on January 13, 1982. Id., Exh. D. On March 5,
14 1982, Petitioner was sentenced to a term of one year of "flat"
15 time in jail and a term of seven years probation. See id., Exh.
16 D.

17 After completing his term of incarceration, Petitioner
18 was twice found to have violated the terms of his probation.
19 Id., Exh. E & Exh. G. As a result of the first violation, the
20 state trial court reinstated Petitioner on intensive probation
21 for a period of 26 months. Id., Exh. F. On November 12, 1987,
22 as a result of Petitioner's second probation violation, the
23 trial court revoked Petitioner's probation and sentenced him to
24 seven years imprisonment, the presumptive term for a conviction
25 of sexual assault, the 1982 charge of conviction, with 451 days
26 of presentence incarceration credit. Id., Exh. H.

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1 After each of the hearings regarding the alleged
2 violation of the terms of parole, Petitioner signed a form
3 indicating he had been informed of his right to appeal these
4 decisions. See id., Exh. I. Petitioner did not, however, seek
5 appellate review of his 1982 conviction for sexual assault or
6 the initial sentence imposed pursuant to this conviction, nor
7 did he seek review of the revocation of his probation and his
8 resulting incarceration in 1987.¹

9 The sentence of seven years imprisonment imposed in
10 1987, with credit for 451 days of presentence incarceration and
11 allowing no accredited time for good behavior, would have
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¹ Respondents note:

From the time Petitioner pled guilty in the 1981 Case, on January 13, 1982, through and including the date his probation was revoked and he was sentenced to a seven-year term of imprisonment, November 12, 1987, Petitioner had the right to seek conventional appellate review. See Ariz. R. Crim. P. 17(e). It was not until 1992 that Arizona Rule of Criminal Procedure 17.1(e) was amended to read: "By pleading guilty or no contest in a noncapital case, a defendant waives the right to have the appellate courts review the proceedings by way of direct appeal, and may seek review only by filing a petition for post-conviction relief pursuant to Rule 32 and, if denied, a petition for review."

23 Docket No. 7 at 4 n.2.

24 In 1987, Ariz. R. Crim. P. 32.4(a) provided that
25 a petition for PCR "may be filed at any time
26 after entry of judgment and sentence." Ariz. R.
27 Crim. P. 32.4(a) (West 1987). In 1992, the
Arizona Supreme Court amended Rule 32.4(a) by
adding time limits for specific claims in
non-capital cases and automatic filing in capital
cases.

Docket No. 7 at 5 n.3.

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1 expired in mid-August of 1993.²

2 Arizona's sexual offender registration statute became
3 effective July 27, 1983, see Arizona v. Noble, 171 Ariz. 171,
4 173, 829 P.2d 1217, 1219 (1992) (holding the application of the
5 statute to a crime committed prior to its enactment did not
6 violate the defendant's right to be free of *ex post facto* laws),
7 after Petitioner entered into the 1982 plea agreement but before
8 Petitioner was sentenced to a term of incarceration pursuant to
9 his violation of probation imposed for the sexual assault
10 conviction.

11 On May 8, 2002, Petitioner pled guilty to one count of
12 possession of narcotic drugs in Maricopa County docket number
13 CR2002-004244. Id., Exh. Q. On July 12, 2002, the trial court
14 suspended the imposition of sentence and placed Petitioner on
15 probation for four years. Id., Exh. R.

16 On August 26, 2002, shortly after he was placed on
17 probation in CR2002-004244, Petitioner was charged with one
18 count of use or possession of methamphetamine and one count of
19 possession of drug paraphernalia in Maricopa County docket
20 number CR2002-014683. Id., Exh. S. On January 31, 2003,
21 pursuant to a plea agreement proving the state would dismiss the
22 second count in CR2002-014683, Petitioner pled guilty to one
23 count of possession or use of methamphetamine. Id., Exh. T.
24 Petitioner's guilty plea in CR2002-014683 constituted a

25
26 ² Petitioner filed sexual offender registration change of
address forms in 1991 and 1995. See Answer, Exh. Z at 108. The form
27 dated October 29, 1991, indicates Petitioner was previously in
custody.

1 violation of the conditions of his probation imposed in
2 CR2002-004244. Id., Exh. U. On February 21, 2003, Petitioner
3 was reinstated to probation in CR2002-004244, see id., Exh. V at
4 84, and placed on a concurrent three-year probationary term in
5 CR2002-014683. Id., Exh. W.

6 On June 19, 2003, Petitioner was charged with failing
7 to register as a sex offender, a class 4 felony, between March
8 31, 2003, and June 9, 2003, in Maricopa County docket number
9 CR2003-035096. Id., Exh. X. The state also alleged that
10 Petitioner had prior felony convictions and that he committed
11 the alleged offense, i.e., failure to register as a sex
12 offender, while on probation. Id., Exh. Y. Petitioner filed a
13 motion to dismiss the charges stated in docket number
14 CR2003-035096. Id., Exh. Z. In support of his motion to
15 dismiss the charge of failing to register as a sex offender
16 Petitioner attached copies of sex offender registration forms
17 and address update changes that he had previously completed
18 pursuant to Arizona Revised Statutes § 13-3821, beginning in
19 January of 1987. Id., Exh. Z at 101-16. The motion to dismiss
20 was denied.

21 On December 18, 2003, Petitioner pled guilty to one
22 count of failure to register as a sex offender in exchange for
23 the state's agreement to dismiss the allegation of prior felony
24 convictions. Id., Exh. AA at 117. Petitioner's guilty plea in
25 CR2003-035096 constituted an automatic violation of probation in
26 both of the 2002 cases. Id., Exh. BB at 121, 123. On June 11,
27 2004, the trial court revoked Petitioner's probation in both of
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1 the 2002 cases and sentenced Petitioner to concurrent prison
2 terms of 2.5 years dating from that date with credit for
3 presentence incarceration of 487 days. Id., Exh. CC at 126,
4 129. The presentence incarceration credit was altered on May 8,
5 2007, to 660 days in CR2002-004244 and 461 days in CR2002-14683.
6 See id., Exh. LL.

7 Also on June 11, 2004, in the 2003 case, CR2003-35096,
8 the state trial court denied Petitioner's motion to withdraw
9 from the plea agreement and sentenced Petitioner to the
10 presumptive term of 2.5 year imprisonment, which sentence was
11 ordered to run consecutively to the sentences imposed in the
12 2002 cases. Id., Exh. DD. Petitioner was given credit for 171
13 days of presentence incarceration, which was amended to 343 days
14 of presentence incarceration on May 8, 2007. Id., Exh. DD.
15 Accordingly, as of June 2004, Petitioner was serving a term of
16 five years imprisonment pursuant to the 2002 and 2003
17 convictions, including his conviction for failure to register as
18 a sex offender, and his violation of probation in the 2002
19 cases. The sentences for the 2002 convictions would have
20 "begun" on approximately April 19, 2002, and accordingly be
21 completely served by November of 2004. Petitioner would have
22 begun serving his consecutive 2.5 year sentence pursuant to his
23 2003 conviction in December of 2004, and completed it, absent
24 any credit for presentence incarceration or good time, in June

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1 of 2007.³

2 On March 22, 2005, in Maricopa County docket number
 3 CR2004-006251, Petitioner was sentenced to a 12 year term of
 4 imprisonment and a concurrent six year term of imprisonment,
 5 after being convicted by a jury of robbery and unlawful flight
 6 from a law enforcement vehicle. Id., Exh. MM. Both sentences
 7 were ordered to run consecutively to the sentences imposed in
 8 one of the 2002 cases and the 2003 case. Id., Exh. MM.

9 On May 30, 2006, 13 years after his seven-year term of
 10 imprisonment in CR1981-121923 had been fully served, but before
 11 his sentence of incarceration with regard to his 2003 conviction
 12 had been served, Petitioner filed a notice of post-conviction
 13 relief in the state trial court pursuant to Rule 32, Arizona
 14 Rules of Criminal Procedure. Id., Exh. J at 22, 26. Petitioner
 15 asked the state court to order the "state to comply with its
 16 plea agreement and that the defendant is not required to
 17 register as a sex offender." Id., Exh. J at 25.

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20 ³ The undersigned's calculations do not comport in all
 21 respects with Respondents' but, using either calculation, the result
 22 is the same.

23 Respondents calculate:

24 This information is confirmed as follows: (1) A
 25 2.5-year term amounts to 912 days ((365 days
 26 times 2) plus (365 days divided by 2) = 912
 27 days); (2) The 912- day term in CR2002-004244,
 28 reduced by 660 days of presentence custody
 credit, began on June 11, 2004 and expired 252
 days later, on February 18, 2005; (3) The 912-day
 term in CR2002-014683, reduced by 461 days of
 presentence custody credit, began on June 11,
 2004 and expired 451 days later, on September 5,
 2005. See Ex. NN at 205.

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1 Petitioner was appointed counsel, who notified the
2 court that she was unable to find any colorable claims to raise
3 on Petitioner's behalf. Id., Exh. K. On November 20, 2006,
4 Petitioner filed a *pro per* petition in his state Rule 32 action.
5 Petitioner asserted he was entitled to relief because his plea
6 agreement in the 1982 case was breached when the state began
7 making Petitioner register as a sex offender. Id., Exh. L at
8 37-38. Petitioner argued that, because the 1982 plea agreement
9 did not require him to register as a sex offender, requiring him
10 to do so was breach of contract in violation of Article I,
11 section 10 of the United States Constitution. Id., Exh. L at
12 39. Petitioner further asserted his Fourteenth Amendment right
13 to due process was violated when "[t]he State falsely informed
14 the Petitioner of the consequences of the plea agreement." Id.,
15 Exh. L at 40.

16 On February 27, 2007, the state trial court summarily
17 dismissed Petitioner's Rule 32 action regarding his 1982
18 conviction "for failure to state a colorable claim for relief."
19 Id., Exh. N. The state court concluded Petitioner's claim for
20 relief focused on his failure to

21 register as a sex offender. He pled guilty to
22 this offense in CR2003-035096. That matter
23 was appealed and the Court of Appeals
24 resolved the matter affirming the conviction
25 but giving [Petitioner] 2 additional days of
26 pre-incarceration credit. All other claims
27 flowing from that case were waived.
[Petitioner] seems to be saying that in this
case when he signed his original plea
agreement he should have been advised of all
possible future legislation or requirements
that might be placed upon him. No such
requirements exist for any attorney by any

1 standard. The state did not breach its
2 contract with him in the plea agreement which
3 was executed. The Legislature subsequently
admitted he failed to meet in CR2003-035096.

4 Id., Exh. N.

5 In the federal habeas petition before the Court
6 Petitioner asserts he is entitled to habeas relief because his
7 right to due process has been violated. Petitioner argues the
8 state breached the terms of the 1982 plea agreement. Petitioner
9 alleges that the state's failure to honor the terms of the 1982
10 plea agreement was a "law impairing the obligation of the
11 contract," in violation of Article I, paragraph 10, of the
12 United States Constitution. Docket No. 3 at 1-2. Petitioner
13 also alleges that his guilty plea was not knowing and voluntary,
14 in violation of his Fourteenth Amendment due process rights,
15 because he was not informed of all the "[r]amifications of the
16 consequences and the rights he [would] forfeit" as a result of
17 the guilty plea i.e., the potential for incarceration if he did
18 not register as a sex offender. See id. at 1.

19 **II Analysis**

20 **A. Petitioner is not "in custody" as that term is
21 defined by the relevant federal statute governing jurisdiction
22 over federal habeas petitions**

23 The United States District Courts have the power to
24 grant a writ of habeas corpus only to individuals "in custody in
25 violation of the Constitution or laws or treaties of the United
26 States." 28 U.S.C. § 2254(a) (2006 & Supp. 2008).

27 For a federal court to have jurisdiction over

1 a habeas petition filed by a state prisoner,
 2 the petitioner must be "in custody".... The
 3 general rule concerning mootness has long
 4 been that a petition for habeas corpus
 5 becomes moot when a prisoner completes his
 6 sentence before the court has addressed the
 7 merits of his petition.

8 Zichko v. Idaho, 247 F.3d 1015, 1019 (9th Cir. 2001) (citations
 9 omitted).

10 The case-or-controversy requirement of Article III,
 11 paragraph 2, of the United States Constitution "subsists through
 12 all stages of federal judicial proceedings ... The parties must
 13 continue to have a personal stake in the outcome of the
 14 lawsuit." Lewis v. Continental Bank Corp., 494 U.S. 472,
 15 477-78, 110 S. Ct. 1249, 1253-54 (1990) (internal quotations
 16 omitted). If a habeas action seeking the petitioner's release
 17 from confinement is adjudicated after the petitioner has been
 18 released "some concrete and continuing injury" or "collateral
 19 consequence" of the challenged decision must exist for the
 20 habeas action to be maintained. See Spencer v. Kemna, 523 U.S.
 21 1, 7, 118 S. Ct. 978, 982 (1998).

22 Petitioner has completely served the term of
 23 incarceration and probation imposed for his 1982 sexual assault
 24 conviction and the prison term imposed for his 2003 failure-to-
 25 register conviction. Petitioner has not demonstrated that the
 26 sexual registration requirement imposed on him as a result of
 27 his 1982 sexual assault conviction rises "to a significant
 28 restraint upon his liberty 'not shared by the public
 29 generally,'" which would render him "in custody" for purposes of
 30 the habeas statute. Dow v. Circuit Court of the First Circuit,

1 995 F.2d 922, 923 (9th Cir. 1993).

2 The Ninth Circuit has held that petitioners who have
 3 completed their prison sentences but are required to register as
 4 sex offenders do not satisfy the "in custody" requirement of
 5 section 2254(a) because registration and notification
 6 requirements are "more properly characterized as a collateral
 7 consequence of conviction rather than as a restraint on
 8 liberty." Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir.
 9 1998) (holding that Washington sexual offender registration laws
 10 do not render registrant "in custody"). See also McNab v. Kok,
 11 170 F.3d 1246, 1247 (9th Cir. 1999) (holding the same with
 12 respect to the Oregon sexual offender laws); Henry v. Lungren,
 13 164 F.3d 1240, 1242 (9th Cir. 1999) (holding the same with
 14 respect to California's sexual offender laws). "[M]erely being
 15 subject to a sex offender registry requirement does not satisfy
 16 the 'in custody' requirement after the original [sex offense]
 17 conviction has expired." Zichko, 247 F.3d at 1020.

18 The Ninth Circuit has held that when a petitioner is
 19 incarcerated for failing to comply with a sex offender
 20 registration statute the petitioner is "in custody" for purposes
 21 of challenging an earlier, expired sex offense conviction that
 22 served as a necessary predicate to the failure-to-register
 23 charge. See id., 247 F.3d at 1019-20 ("[A] habeas petitioner is
 24 'in custody' for the purposes of challenging an earlier, expired
 25 rape conviction, when he is incarcerated for failing to comply
 26 with a state sex offender registration law because the earlier
 27 rape conviction 'is a necessary predicate' to the failure to

1 register charge."). However, Petitioner cannot challenge his
2 expired 1982 sexual assault conviction pursuant to this
3 statement in Zichko because he is no longer incarcerated as a
4 result of his 2003 conviction for failure-to-register as a sex
5 offender. Although Petitioner was previously incarcerated for
6 failure to comply with Arizona's sex offender registration
7 statute, see Answer, Ex. NN, he was not confined as a result of
8 such conviction on February 7, 2008, when the instant petition
9 was filed. Petitioner is currently in custody pursuant to a
10 conviction completely unrelated to both his 1982 sexual assault
11 conviction and his 2003 conviction for failure-to-register as a
12 sex offender. See id., Ex. NN at 204-05. Because Petitioner
13 cannot show that he was "in custody" on either his 1982 sexual
14 assault conviction or his 2003 failure-to-register conviction at
15 the time he filed the instant petition seeking habeas relief
16 pursuant to section 2254, this Court lacks subject-matter
17 jurisdiction over the petition challenging the validity of his
18 1982 conviction.

B. Relevant statute of limitations

20 Additionally, the habeas petition, attacking a
21 conviction which became final in 1982, is also barred by the
22 applicable statute of limitations as found in the Antiterrorism
23 and Effective Death Penalty Act ("AEDPA").

24 The AEDPA imposed a one-year statute of limitations on
25 state prisoners seeking federal habeas relief from their state
26 convictions. See Lott v. Mueller, 304 F.3d 918, 920 (9th Cir.
27 2002). Additionally, the AEDPA required state prisoners whose

1 convictions became final before April 24, 1996, to file any
2 petition for federal habeas corpus relief from those convictions
3 by April 24, 1997. See Patterson v. Stewart, 251 F.3d 1243,
4 1246 (9th Cir. 2001). The AEDPA provides that a petitioner is
5 entitled to tolling of the statute of limitations during the
6 pendency of a "properly filed application for state
7 post-conviction or other collateral review with respect to the
8 pertinent judgment or claim." 28 U.S.C. § 2244(d)(2); Artuz v.
9 Bennet, 531 U.S. 4, 8, 121 S. Ct. 361, 363-64 (2000).

10 Because Petitioner's 1982 state conviction became final
11 prior to 1996, pursuant to the AEDPA the one-year statute of
12 limitations on Petitioner's action for federal habeas relief
13 began to run on April 24, 1996, and expired on April 23, 1997,
14 unless it was tolled by any pending action for state post-
15 conviction relief. See Patterson, 251 F.3d at 1246.

16 Petitioner did not file any action seeking state post-
17 conviction relief from his 1982 conviction until 2006. This
18 Rule 32 action could not and did not "restart" the already-
19 expired statute of limitations. See Ferguson v. Palmateer, 321
20 F.3d 820, 823 (9th Cir. 2003), citing Tinker v. Moore, 255 F.3d
21 1331, 1333 (11th Cir. 2001); Preston v. Gibson, 234 F.3d 1118,
22 1120 (10th Cir. 2000).

23 The undersigned has previously reasoned that section
24 2254 habeas applicants are no longer entitled to consideration
25 of the merits of their untimely petitions based on the doctrine
26 that the statute of limitations could be equitably tolled. The
27 Supreme Court recently concluded section 2254 petitioners are
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1 not entitled to equitable tolling of the AEDPA's statute of
 2 limitations because this does not comport with the plain meaning
 3 of the statute. See Bowles v. Russell, 127 S. Ct. 2360, 2365
 4 (2007) (holding that "time limits enacted by Congress" are
 5 "jurisdictional" and rejecting the argument that the federal
 6 courts could craft an "equitable" exception to the
 7 jurisdictional requirement).⁴ But see Lawrence v. Florida, 127
 8 S. Ct. 1079, 1085 (2007) (assuming, without deciding, that
 9 section 2244(d) provides for equitable tolling).

10 However, assuming the doctrine of equitable tolling
 11 applies, the Ninth Circuit Court of Appeals has determined that
 12 equitable tolling of the filing deadline for a federal habeas
 13 petition is available only if extraordinary circumstances beyond
 14 the petitioner's control made it impossible for him to file a
 15 petition on time. See Gaston v. Palmer, 417 F.3d 1030, 1034
 16 (9th Cir. 2003); Malcom v. Payne, 281 F.3d 951, 962 (9th Cir.
 17 2002). Equitable tolling is only appropriate when external
 18 forces, rather than a petitioner's lack of diligence, account
 19 for the failure to file a timely claim. See Miles v. Prunty,
 20 187 F.3d 1104, 1107 (9th Cir. 1999). It is Petitioner's burden
 21 to establish that equitable tolling is warranted in his case.
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23 ⁴ This holding does not affect a petitioner's ability to
 24 raise claims involving a change in the law made retroactive to cases
 25 on collateral review by the United States Supreme Court or claims
 26 involving newly-discovered evidence of innocence. See 28 U.S.C. §
 27 2244(b)(2) (2004 & Supp. 2007). Absent those circumstances, which are
 28 not present here, the strict application of the jurisdictional
 29 deadline is appropriate in a collateral proceeding and is now
 30 established Supreme Court precedent. See Bowles, 127 S. Ct. at
 31 2365-66.

1 Gaston, 417 F.3d at 1034.

2 Petitioner has not established that there were
 3 extraordinary circumstances beyond his control which made it
 4 impossible for him to file a timely federal habeas petition from
 5 his 1982 conviction. A federal habeas petitioner seeking
 6 equitable tolling must also act with "reasonable" diligence
 7 "throughout the period he seeks to toll." Warren v. Garvin, 219
 8 F.3d 111, 113 (2d Cir. 2000); see also Jones v. Morton, 195 F.3d
 9 153, 159 (3d Cir. 1999).

10 Petitioner has not met his burden of establishing that
 11 there were extraordinary circumstances beyond his control which
 12 made it impossible for him to file a timely federal habeas
 13 petition throughout the period 1996 through 2007, or that any
 14 state action was the "but for" cause for his failure to timely
 15 file his federal habeas action. See Pace v. DiGuglielmo, 544
 16 U.S. 408, 125 S. Ct. 1807, 1815 (2005) (concluding that the
 17 petitioner was not entitled to equitable tolling because he was
 18 misled or confused about timing of exhausting his state remedies
 19 and filing his federal habeas petition); Shannon v. Newland, 410
 20 F.3d 1083, 1090 (9th Cir. 2005) ("Each of the cases in which
 21 equitable tolling has been applied have involved wrongful
 22 conduct, either by state officials or, occasionally, by the
 23 petitioner's counsel."). Compare Sanchez v. Cambra, 137 Fed.
 24 App. 989, 990 (9th Cir. 2005), cert. denied, 126 S. Ct. 1333
 25 (2006); Corjasso v. Ayers, 278 F.3d 874, 877-78 (9th Cir. 2002).

26 Petitioner does not claim he was misled about the
 27 statute of limitations or that Respondents acted to inhibit the
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1 filing of his federal habeas petition. A petitioner's *pro se*
2 status, ignorance of the law, lack of representation during the
3 applicable filing period, and temporary incapacity do not
4 constitute extraordinary circumstances justifying equitable
5 tolling. See, e.g., Fisher v. Johnson, 174 F.3d 710, 714-716
6 (5th Cir. 1999); Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir.
7 2004) (holding that petitioner's misunderstanding of state's
8 "rules, statutes, and the time period set forth therein do not
9 justify equitable tolling").

III Conclusion

11 In response to the answer to his habeas petition,
12 Petitioner asserts that his 1982 conviction does "entail adverse
13 collateral legal consequences" because his prior conviction was
14 used to aggravate his sentence in docket number CR 2004-062510.
15 Docket No. 11 at 1. Accordingly, Petitioner argues, his
16 conviction "can never be moot, because [his] conviction [may]
17 also be used in later case for impeachment." Id. at 2. This
18 assertion fails for the reasons stated *supra* citing Zichko.
19 Petitioner further claims that "he was not guilty for this crime
20 of sexual assualt (sic) and has never plead guilty to it, but
21 Alford factual basis, I never admitted guilt. Therefore,
22 Petitioner's three claims are not procedurally barred." Id.
23 Petitioner's argument regarding a procedural bar to his federal
24 habeas petition does not alter the conclusion that his petition
25 is moot. The Court may not exercise jurisdiction over the
26 habeas petition because Petitioner is not "in custody" pursuant
27 to the conviction he seeks to challenge. Additionally, any

1 challenge to Petitioner's 1982 conviction predicated on section
2 2254 is not timely filed.

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4 **IT IS THEREFORE RECOMMENDED** that Mr. Hearn's Petition
5 for Writ of Habeas Corpus be **denied and dismissed with**
6 **prejudice.**

7 This recommendation is not an order that is immediately
8 appealable to the Ninth Circuit Court of Appeals. Any notice of
9 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
10 Procedure, should not be filed until entry of the district
11 court's judgment.

12 Pursuant to Rule 72(b), Federal Rules of Civil
13 Procedure, the parties shall have ten (10) days from the date of
14 service of a copy of this recommendation within which to file
15 specific written objections with the Court. Thereafter, the
16 parties have ten (10) days within which to file a response to
17 the objections. Failure to timely file objections to any
18 factual or legal determinations of the Magistrate Judge will be
19 considered a waiver of a party's right to de novo appellate
20 consideration of the issues. See United States v. Reyna-Tapia,
21 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Failure to
22 timely file objections to any factual or legal determinations of
23 the Magistrate Judge will constitute a waiver of a party's right
24 to appellate review of the findings of fact and conclusions of
25 law in an order or judgment entered pursuant to the
26 recommendation of the Magistrate Judge.

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1 DATED this 15th day of July, 2008.
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6 Mark E. Asprey
7 United States Magistrate Judge
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